No. 80849-0

FAIRHURST, J. (concurring) — In *State v. Momah*, No. 81096-6 (Wash. Oct. 8, 2009), I agreed to affirm Charles Momah's convictions because the facts presented circumstances where the trial court needed to close a portion of voir dire to the public in order to protect the defendant's right to a fair trial. I reach a different conclusion here because Tony L. Strode's right to a public trial has not been waived nor has it been safeguarded as required under *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) (the *Bone-Club* analysis was adopted by the court to ensure that trial courts will be very cautious and rigorously safeguard the public trial right). Because the lead opinion conflates the rights of the defendant, the media, and the public, I concur only in the result.

Due to the highly publicized nature of Momah's case, the trial court in that case had no available means of avoiding jury contamination but for closing a portion of the voir dire to individually interview potential jurors.[1] Prior to the individual interviews, there was considerable discussion among the attorneys and the court

[1]The court did not order or direct closure. The record in *Momah* shows that the trial judge apparently believed the proceedings were not closed at all. However, a de facto closure occurred as a result of the locations and physical conditions existing when jurors were individually questioned outside the courtroom in a room not ordinarily accessed by the public with the door closed.

about how to conduct voir dire in a way that would avoid contamination of the jury pool. One of the defendant's attorneys said, "we need to find out what the jury knows about the case . . . and I would suggest we need to do individual voir dire so they don't contaminate the rest of the jury if they are otherwise not acceptable." Tr. of Proceedings on Appeal (Oct. 6, 2005) (hereinafter TP Momah) at 68, *Momah*, No. 81096-6. At another point, also before voir dire commenced, the attorney asked to expand the list of jurors who would be questioned individually. Various locations were discussed, with indications that the size of the jury pool needed and the availability of rooms played a part in the determination of where voir dire occurred. *See, e.g.*, *id.* at 79-81; TP Momah (Oct. 10, 2005), No. 81096-6, at 156; TP Momah (Oct. 11, 2005), No. 81096-6, at 2, 4, 105. When it became obvious that the original pool of 100 jurors was inadequate, another 50 jurors were called, and defense counsel said, "I take it we will go through the same procedure as before?" TP Momah (Oct. 11, 2005), No. 81096-6, at 105. That is, individual voir dire of certain of the prospective jurors.

The trial court in *Momah* was aware at all times of the requirement that the trial be public. On October 6, 2005, before voir dire began, the trial court advised the attorneys that a television station had contacted the court about viewing jury

selection. One of the defendant's attorneys was quite concerned about this and said, "I would very much object to jury selection being televised." TP Momah (Oct. 6, 2005), No. 81096-6, at 93. He added that his experience was that "they can't show the jurors anyway." *Id.* One of the prosecuting attorneys noted that *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005), had been decided that day and "talked about the fact that jury selection is open and public . . . so long as it's open and public in some way, it doesn't matter to me." TP Momah (Oct. 6, 2005), No. 81096-6, at 93.

The trial court added that new GR 16 "presumes all proceedings are open." *Id.* The trial court ruled that if there was any proposed restriction of cameras, the trial court would invite the media's reaction and hold a hearing. Defense counsel noted that his experience was "that the press has in the past agreed that they will not do this . . . [v]oluntarily." *Id.* at 94. The trial court responded that such restrictions sounded reasonable but expressed concern that GR 16 required that all proceedings are presumed open.

The record shows that safeguarding Momah's rights to an impartial jury and a fair trial required the closure that occurred, and that all the attorneys, the defendant, and the trial court knew that all the proceedings were presumptively open and

public. The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in Momah's case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude--the right to an impartial jury.

The specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court. The defendant himself established the need for private individual questioning to avoid contamination of the jury pool. There is no suggestion that Momah was denied the right to object. The individual questioning of jurors behind closed doors, whether in a courtroom or another room, was the only adequate way to sufficiently protect the defendant's right to an impartial jury, and the record shows practical matters came into play, such as the size of the jury pool and room availability. The limited closure was no broader than needed to individually question jurors about what they had heard about the case and the private matters that might affect their ability to fairly hear the case. In the circumstances in *Momah*, the requirements and purposes of the *Bone-Club* analysis were met.

Even if the requirements were not sufficiently satisfied on the record in

Momah, the court could properly conclude that the defendant waived his public trial right. A waiver is an intentional relinquishment or abandonment of a known right or privilege. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). We have often recognized that a defendant's rights, even a right of constitutional magnitude, can be waived. While it is true the failure to object, alone, does not constitute waiver of the right to a public trial, the record in *Momah* shows more than a failure to object. Prior to voir dire, the defendant was expressly advised that *all proceedings* are presumptively public. Nonetheless, the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this. At no time did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right. The record shows the defendant intentionally relinquished a known right.

The lead opinion here states that the right to a public trial is set forth in the same provisions as the right to a jury trial and, therefore, "[i]t seems reasonable . . . that the right to a public trial can be waived only in a knowing, voluntary, and

intelligent manner." Lead opinion at 8 n.3. If the lead opinion means that only an on-the-record colloquy showing such a waiver will suffice, I disagree. Waiver of many important constitutional rights may occur without an on-the-record colloquy. *See, e.g., State v. Stegall*, 124 Wn.2d 719, 881 P.2d 979 (1994) (waiver of the right to a 12-person jury may be shown by a personal statement from the defendant expressly agreeing to waiver or an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney's waiving the right); *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (no requirement of on-the-record waiver of the right to testify is required); *State v. Woods*, 143 Wn.2d 561, 608-09, 23 P.3d 1046 (2001) (no on-the-record colloquy required for waiver of a capital defendant's right to present mitigating evidence); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-11, 691 P.2d 957 (1984) (on-the-record colloquy is preferred for waiver of right to representation of counsel and choice of self-representation, but absent such evidence, court will examine record and waiver may be found if it shows actual awareness of risks of self-representation); *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003) (waiver of right to be present at trial must be voluntary and knowing, but once trial has begun in the defendant's presence, a subsequent voluntary absence acts as implied waiver of the right).

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that "public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors." Dissent at 4. I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have "undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury." *Id*. at 4-5 (emphasis added). But the *potential* for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in *Momah*, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the *Bone-Club* analysis on the record is required. The trial court here erred in failing to engage in the *Bone-Club* analysis.

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.

For the foregoing reasons, I concur with the lead opinion's holding requiring automatic reversal and remand.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:

Justice Barbara A. Madsen